82-726

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CEL-A-PAK,
Petitioner,

vs.

CALIFORNIA AGRICULTURAL LABOR RELATIONS BOARD and UNITED FARM WORKERS, AFL-CIO,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I

Is the United Farm Workers union subject to the prohibitions against secondary boycotts provided in the National Labor Relations Act, particularly in view of *National Broilers Marketing Association v. U.S.*, 436 U.S. 816?

II

Can a State labor relations board be enjoined by the U.S. District Court from regulating labor relations subject to the National Labor Relations Act, particularly where the National Labor Relations Board has held the employees and employers involved subject to the act?

III

Can States in view of the commerce clause regulate the labor relations of interstate agriculture?

IV

Is the agricultural exemption contained in the National Labor Relations Act unconstitutional as depriving employers, employees and unions in the agricultural industry of equal protection of the law?

V

Does the 1979 amendment to Rules 3C of the appellate rules allow a motion for injunction pending appeal to be considered as an informal notice of appeal in order to reach the merits of controversy?

VI

In view of the conceded fact that the Rule 60b motion was reviewable by the Court of Appeals, can the issue of the failure to exercise jurisdiction by the District Court be reviewed?

VII

Can a District Court refuse to exercise jurisdiction on "case or controversy" grounds on the question of whether State or Federal law controls an appeal on labor relations unless a union has actually won an election in view of this Court's decisions in *Babbitt v. United Farm Workers*, 442 U.S. 289, and *Super Tire Engineering Company v. McCorkle*, 416 U.S. 115?

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OPINIONS BELOW

The opinion of the Court of Appeals filed July 2, 1982 is reported in F2d. A copy is printed as Appendix A. The Court of Appeals without opinion denied petitioner's petition for rehearing on July 28, 1982. The District Court's order of dismissal is printed as Appendix B.

JURISDICTION

The opinion of the U.S. Court of Appeals of the Ninth Circuit was filed on July 2, 1982. Cel-A-Pak's timely petition for re-hearing was denied on July 28, 1982. The jurisdiction of the Court is invoked under 28 USC 1254 (1).

STATUTORY PROVISION INVOLVED

Rule 3c of the Appellate rules provides in pertinent part:

> An appeal shall not be dismissed for informality of form or title of notice of appeal.

STATEMENT OF THE CASE

This action involves a complaint filed October 27, 1976, requesting a declaratory judgment, declaring the petitioner, its employees and the United Farm Workers were subject to the National Labor Relations Act; for damages against the UFW for a secondary boycott, in violation of the National Labor Relations Act; and for an injunction against the State Agricultural Labor Relations Board, enjoining its processing of unfair labor practice complaints, its supervision of an election then pending and its regulation of petitioner's labor relations in general.

In the approximately six years that this complaint has been outstanding, according to the Opinion of the district court, two other elections were processed, including one which was being processed at the time the district court dismissed the complaint.

Petitioner is a packer of cauliflower in the Salinas Valley; it does no farming. The particular employees who were the subject of the organizational activities were harvester-trailer pullers. They harvest cauliflower, load it onto trailers and drive it to the edge of the fields adjacent to the highway, where truck drivers pick up the cauliflower and transport it to the packing shed. The cauliflower is then processed, wrapped in cellophane and transported in interstate commerce.

The National Labor Relations Board, in the *Grower-Shipper*-Cel-A-Pak case, 230 NLRB 150, specifically found that petitioner's employees, who operated auxiliary equipment, that is, the harvester trailer pullers, were subject to the National Labor Relations Act. However, the State Labor Board has consistently refused to deny jurisdiction and has continued to supervise petitioner's labor relations despite this Court's decision in *Bayside Enterprises v. NLRB*, 97 Sup.Ct. 576. The State Labor Board itself has never accepted this matter for hearing. However, the Regional Director, in an Opinion which is attached as Exhibit "C" to petitioner's Application for Injunction Pending Appeal, before Judge Rehnquist as Circuit Justice, found that the employees were subject to the jurisdiction of the State Act. While we disagree with the conclusions contained in the Opinion, the summary of facts is, in general, accurate. Throughout the six years of this litigation, the UFW has conducted a secondary boycott of petitioner, in violation of the National Labor Relations Act.

The case has never been tried on the merits.

In April of 1977, the district court deferred to State regulation and dismissed the complaint, holding that petitioner's remedy lay only with the State administrative and judicial system. Appeal was then taken to the Court of Appeals for the Ninth Circuit. The Court of Appeals, in an Opinion filed October 29, 1978, remanded the case "to the district court for further proceedings and reconsideration in light of recent events." It is to be noted that after submission before the Ninth Circuit, another representational election was pending. However, by the time the case reached the district court for the second time, that election had been concluded.

An amended complaint was then filed, setting forth approximately thirty different instances of State regulation of petitioner's labor relations by the State of California. The matter was then briefed, argued, and on April 19, 1979, the case was again submitted before the district court.

While the case was submitted and just prior to the filing of the court's Order of dismissal (see footnote 4, district court Opinion), the UFW filed a preliminary election petition and this fact was called to the attention of the court. However, without waiting to determine the result of the election process or considering whether it could be properly enjoined, the district court ordered the case dismissed, without considering the merits, and held that there was no case or controversy.

As stated in the second Opinion of the Court of Appeals:

> "'several hypothetical events would have to occur before such a certification [of a union as bargaining representative] might pose a realistic threat of injury—a labor organization would have to file the requisite petitions, win the election, and the ALRB would have to decide that it has jurisdiction over these employees.'"

Shortly after the filing of the district court's Opinion, the State of California commenced its processes under the State Agricultural Labor Relations law. After the ten-day period allowed for filing of a motion for new trial, but before the thirty-day period for filing a notice of appeal, petitioner filed a motion under Rule 60b for reconsideration in light of the threatened State action. In addition, petitioner filed a motion for an injunction pending appeal to the Ninth Circuit as required by the appellate Rules.

The district court did not rule on either the motion for injunction pending appeal or the motion for reconsideration under Rule 60b until after thirty days from the September 4 judgment. It denied both motions. Appeal was then taken to the Court of Appeals for the Ninth Circuit.

Shortly before oral argument, the Court of Appeals raised as of its own motion the question of whether the appeal was barred under Rule 4a of the Federal Rules of Appellate Procedure. The matter was submitted in August of 1981, and no decision was reached by the Court of Appeals until July of 1982, slightly less than one year later. The Court of Appeals, again without reaching the merits, dismissed the appeal, refusing to consider the motion for an injunction pending appeal as an informal notice of appeal under Rule 3 of the appellate Rules, and declaring further that the district court was correct, even under the Rule 60b motion, in holding that "cognizable injury was still speculative and hypothetical." The court adopting the rationale stated above by the district court.

It is to be noted that for more than six years, the Federal courts have failed to rule on whether a State administrative labor body can regulate labor relations of an employer who has been found subject to the National Labor Relations Act by the National Labor Relations Board.

REASONS FOR GRANTING THE WRIT

1. The dismissal of the appeal for defects in the Notice of Appeal is in conflict with the decisions of other courts of appeals, in opposition to decisions of the Supreme Court, and violates provisions of Rule 3c of the Federal Rules of Appellate Procedure

Rule 3c of the appellate Rules was amended in 1979 to provide that "an appeal shall not be dismissed for in-

formality of form or title of the notice of appeal." The notes of the Advisory Committee make it clear that if a paper is filed "indicating an intention to appeal," it should be so considered by the Court of Appeals.

In this case, petitioner requested an injunction pending appeal, as required by the appellate Rules, as the preliminary to application to the Court of Appeals, evidencing a clear intention to appeal.

The Court of Appeals' decision would appear to be inconsistent with its own case of *Cutting v. Bullerdick* (9th Cir. 1949), 178 F.2d 778, where the court held that Rule 3 could be satisfied by a motion to stay execution, but in any event, it is in conflict with *Cobb v. Lewis* (5th Cir. 1974), 488 F.2d 41, cited by the Advisory Committee; *O'Neal v. United States* (CA, ALA), 272 F.2d 412 (appeal bond); and *Shannon v. United States* (D.C. Cir. .....), 206 F.2d 479 (application to proceed in forma pauperis).

The decision of the Court of Appeals directly defies this Court's admonition in *Foman v. Davis*, 371 U.S. 178, not to avoid decisions on the merits on the basis of mere technicalities.

Furthermore, the grounds of the court's decision would appear to be based upon a premise, if not incorrect under the decisions of the Ninth Circuit, is in conflict with the decisions of other circuits and of this Court.

The weight of authority and this Court have held that a Rule 60b motion can be considered during the pendency of an appeal and the District Court has jurisdiction. In *Standard Oil of California v. United States* (1976), 429 U.S. 17, the Court stated that the trial court is in a much

better position to pass upon the issues presented in a motion pursuant to Rule 60b. *See, also, Ryan v. United States Lines* (2d Cir. 1962), 303 F.2d 430; *Oliver v. Home Indemnity Co.* (5th Cir. 1972), 470 F.2d 329.

In this case, the Court of Appeals resolved an apparent ambiguity against this litigant's right to have its case decided on the merits, contrary to the widely stated maxim of federal judicial procedure.

In passing, petitioner cannot help but comment that in spite of the Court of Appeals' statement that the previous unpublished Order of the Ninth Circuit was not a "limited remand," an examination of that Order, in light of the fact that an election was at that time pending, leads to the conclusion that the Court of Appeals wanted a factual determination by the district court to determine whether it had jurisdiction to review on case or controversy grounds.

2. The decision raises significant and recurrent problems concerning efforts to control by federal judicial action state agricultural labor regulation preempted by the National Labor Relations Act

The Court of Appeals' decision approves the narrow ruling of the district court, holding that even if a representational election is pending, there is no "case or controversy" because the threatened State regulation is "still speculative and hypothetical." Such a ruling, as a practical matter, grants immunity from Federal action to control a State agricultural labor Board which refuses to follow the determinations of Federal jurisdiction made by the National Labor Relations Board. In a broader sense,

it forecloses the possibility of any Federal inquiry into State action which invades the province of the National Labor Relations Act.

The period of time covered by a State regulated representational election is necessarily short. By denying Federal jurisdiction over threatened regulation, this decision, under these circumstances, makes review impossible. Once an election is held, the damage is done. A winning union would be entitled to represent the employees in question even under Federal law.

The decision of the district court approved by the Court of Appeals is directly in conflict with this Court's decision in *Super Tire Engineering Co. v. McCorkle,* 416 U.S. 115. Obviously, the State labor regulation involved here has been and is capable of repetition. Just as obviously, the decisions of the Court of Appeals and the district court allow that State action to evade Federal review.

This case is also in conflict with *Florida Board of Business Regulations v. NLRB,* 605 F.2d 916. Furthermore, it appears inconsistent with this Court's decision in *Babbitt v. United Farm Workers,* 442 U.S. 289. The problem presented here is not unique to petitioner. Petitioner, of course, has a strong case since the National Labor Relations Board has actually ruled that it is subject to Federal jurisdiction. However, the problem extends to many other business organizations in the agricultural field whose labor relations under the law are preempted by the National Labor Relations Act.

The problem is compounded by this Court's decision in *Boire v. Greyhound,* 376 U.S. 473, which denies judicial review to an employer with respect to representation. On

an employer petition to have its representational elections conducted by the Federal authority, a denial, either by the staff of the National Labor Relations *Board* or *by the Board* would preclude review by the Federal judiciary on the question of whether under the law the employer's employees were subject to the National Labor Relations Act. The present decision precludes review even where the State initiates proceedings, in defiance of prior findings by the National Labor Relations Board.

3. The decision raises significant and recurrent problems with respect to the scope of review of Rule 60b motions

This case involves a special, but not exceptional, situation where the district court has denied jurisdiction and refused to consider the merits. In view of the Federal judicial policy favoring a decision on the merits, such a decision should not be unduly extended.

The case involves another special, but not exceptional, situation in that the Rule 60b motion was made after the ten-day period for moving for a new trial, but within the time for appeal. As Judge Friendly stated in *Schildhaus v. Moe* (2d Cir. 1964), 335 F.2d 529, 531:

> "Under such circumstances there is indeed good sense in permitting the trial court to correct its own error and, if it refuses, in allowing a timely appeal from the refusal; no good purpose is served by requiring the parties to appeal to a higher court, often requiring remand for further trial proceedings, when the trial court is equally able to correct its decision in the light of new authority on application made within the time permitted for appeal."

See, also, Meadows v. Cohen (5th Cir. 1969), 409 F.2d 750; *Tarkington v. United States Lines* (2d Cir. 1955), 222 F.2d 358; *Oliver v. Home Indemnity Co.* (5th Cir. 1972), 470 F.2d 329.

The new facts which were brought to the attention of the trial court were important. While petitioner believes that the court's denial of jurisdiction was unduly restrictive, in view of this Court's decision in *Super Tire, supra,* nevertheless, what was called to the attention of the court was State action. Even if it could be denied that there was a case or controversy when the Union took action, it should not be denied that there was a case or controversy when the State of California itself acted. We cannot help but wonder, in any event, why the district court, when faced with an ongoing election process and after holding the case under submission for almost seven months, dismissed the complaint just as a situation which would fit its narrow definition of jurisdiction was arising.

The problem here, however, has broader implications. When a district court has denied jurisdiction and the necessary jurisdictional facts are brought to its attention before the time for appeal has expired and jurisdiction is retained in the district court, the court should act. In these circumstances, much judicial time will be saved and certainly the ends of justice will be served by speedier decision.

In reviewing such a decision, we believe the entire question of jurisdiction is raised. The Court of Appeals claims here that the court was acting within its discretion. There cannot be any judicial discretion to deny jurisdiction when jurisdiction exists.

Rule 60b, properly interpreted, could be a useful tool in exceptional circumstances. Cases do not always fit themselves within the narrow time limits contemplated under the Federal Rules. In exceptional circumstances, such as the one here, manifest injustice can be avoided. This Court should grant review with a view to advising the courts below that Rule 60b can and should be utilized in a liberal and just way so as to favor decisions on the merits.

4. The merits of the case below raise important issues with respect to the labor relations of the interstate agricultural industry which should be reviewed by this court

The issues in this case are important to petitioner, specifically, since it involves the question of whether petitioner is subject to Federal or State law with respect to its labor relations. The case raises the question of whether a State is subject to the same rule as the Federal courts with respect to the deference which should be shown to the National Labor Relations Board under *Bayside Enterprises v. NLRB, supra.*

The case further involves an issue not raised in *Babbitt v. United Farm Workers, supra,* as to whether the states can, in view of the commerce clause, regulate interstate agricultural labor relations. It also raises the question as to whether United Farm Workers union is subject to the prohibitions against secondary boycotts contained in the National Labor Relations Act and questions the present validity of *DiGiorgio v. NLRB,* 191 F.2d 642 in view of this Court's decision in *National Broilers Marketing Association v. U.S.,* 436 U.S. 816 where this Court held even one non-agricultural member would destroy an agricultural

exemption. We think a similar rule should apply under the National Labor Relations Act where a union has, or attempts to have, membership which is not agricultural.

These grave questions, important to petitioner in particular and to the agricultural industry in general, should be resolved by this Court or this Court should direct the Court of Appeals to disregard technicalities and decide the questions before it.

Respectfully submitted,

RICHARD H. FOSTER
Attorney for Petitioner

(Appendices follow)

APPENDIX A

United States Court of Appeals
for the Ninth Circuit

No. 79-4743

D.C. No. 76-2381

Cel-A-Pak, a California Corporation,
Plaintiff-Appellant,

v.

California Agricultural Labor Relations Board,
United Farm Workers of America, AFL-CIO,
Western Conference of Teamsters and
General Teamsters Warehousemen
and Helpers' Union
Local No. 890,
Defendants-Appellees.

[Filed July 2, 1982]

OPINION

Appeal from the United States District Court
for the Northern District of California
Albert C. Wollenberg, District Judge, Presiding
Argued and Submitted August 10, 1981

Before: BROWNING, Chief Judge, WRIGHT, Circuit Judge, and BYRNE,* District Judge

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*Honorable Wm. Matthew Byrne, Jr., District Judge, United States District Court for the Central District of California, sitting by designation.

PER CURIAM:

Cel-A-Pak, which harvests and packs cauliflower for independent growers, brought this action against the California Agricultural Labor Relations Board ("ALRB") and the United Farm Workers of America ("UFW") to prevent assertion by the ALRB of jurisdiction over Cel-A-Pak's employees and to recover damages from UFW for injuries allegedly caused by secondary boycotts. On motion for summary judgment, the district court dismissed the claim against ALRB on the ground no justiciable controversy presently existed because appellant was not subject to threatened or actual injury by the potential exercise of jurisdiction by the ALRB, and dismissed the claim against UFW as barred by res judicata.

Judgment was entered on September 4, 1979. On September 18, appellant moved for rehearing and an injunction pending appeal. On October 26, appellant filed a notice of appeal from the September 4 judgment. On October 30, the district court filed an order denying the September 18 post-trial motions.

The notice of appeal was filed more than 30 days after entry of judgment and was therefore untimely under Fed. R. App. P. 4(a). Compliance with these time limitations is both mandatory and jurisdictional. *Browder v. Director, Dept. of Corrections*, 434 U.S. 257, 264 (1978); *Wallace v. Chappell*, 637 F.2d 1345, 1346 (9th Cir. 1981) (en banc).

Since the post-trial motion was filed more than 10 days after entry of judgment it did not toll the Rule 4(a) limitation period. *Browder, supra*, 434 U.S. at 264-65; *see Fassler v. Moran*, 576 F.2d 1372, 1373 (9th Cir. 1978).

Appellant did not move to extend the time for appeal under Fed. R. App. P. 4(a)(5). Mere acceptance of the untimely notice of appeal will not be construed as a grant of such an extension by the district court. *U.S. v. Stolarz*, 547 F.2d 108, 111 (9th Cir. 1976).

Appeal from the underlying judgment of dismissal is timely only if appellant's petition for rehearing and motion for injunction pending appeal (contained in one document) may be treated as a notice of appeal. Fed. R. App. P. 3(c) mandates liberality in determining compliance ("[a]n appeal shall not be dismissed for informality of form or title of the notice of appeal."); "courts of appeals have discretion, when the interests of substantive justice require it, to disregard irregularities in the form or procedure for filing a notice of appeal." *Rabin v. Cohen*, 570 F.2d 864, 866 (9th Cir. 1978), *quoting Cobb v. Lewis*, 488 F.2d 41, 44 (5th Cir. 1974). Documents not so denominated have been treated as notices of appeal so long as they "clearly evince the party's intent to appeal" and provide notice to both the opposing party and the court. *Cobb, supra*, 488 F.2d at 45. *See Foman v. Davis*, 371 U.S. 178, 181 (1972); *Blunt v. United States*, 244 F.2d 355, 359 (D.C. Cir. 1957). *See e.g. Noa v. Key Futures, Inc.*, 638 F.2d 77, 78 (9th Cir. 1980) (stipulation of parties that new judgment be entered so as to allow proper appeal); *Davis v. Dept. of Corrections*, 446 F.2d 644, 645 (9th Cir. 1971) (defective motion for certificate of probable cause); *Curtis Gallery & Library, Inc. v. United States*, 388 F.2d 358, 360 (9th Cir. 1967) (designation of contents of record on appeal and statement of points on appeal); *Burdix v. United States*, 231 F.2d 893, 894 (9th Cir. 1956) (leave to appeal in forma pauperis). But not every document challenging the judg-

ment or relating to a possible appeal suffices. *See Selph v. Council of City of Los Angeles*, 593 F.2d 881, 883 (9th Cir. 1979) (motion to extend the time for appeal not to be treated as a notice of appeal under the circumstances of the case).

Appellant's Rule 60(b) motion for rehearing clearly cannot be treated as a notice of appeal. It does not "clearly evince" an intention to appeal. To hold otherwise would circumvent the established rule that such a motion does not toll the appeal limitations period. *See Saunders v. Cabinet Makers & Millmen, Local 720*, 549 F.2d 1217, 1218 (9th Cir. 1977).

The motion for injunction pending appeal presents a closer question since it indicates appellant contemplated taking an appeal. In a somewhat similar case, *Cutting v. Bullerdick*, 178 F.2d 774, 776-77 (9th Cir. 1949), we held that Fed. R. Civ. P. 73(b), the predecessor to Fed. R. App. P. 3, could be satisfied by a notice of motion to stay execution so appellant could post a supersedeas bond and perfect an appeal. Nonetheless, we conclude that *Cutting* is not dispositive and decline to exercise our discretion to disregard the irregularity in the present case.

Since the appellant is represented by counsel and neither life nor liberty is at stake, solicitude for unwary pro se and criminal litigants, a factor which often warrants exercise of the court's discretion to tolerate informalities (*see Haines v. Kerner*, 404 U.S. 519, 520 (1972); *Alley v. Dodge Hotel*, 501 F.2d 880, 883 (D.C. Cir. 1974)), is not applicable to this case.

The motion seeking an injunction pending appeal has collateral consequences that could conceivably benefit the

appellant even if no appeal were perfected. This distinguishes it from motions that constitute an integral and necessary part of the process of taking an appeal. Such motions offer clearer evidence of an intent to appeal, since they have no independent significance distinct from the appeals process.

If a motion for injunction pending appeal were deemed a notice of appeal, the document filed by appellant would be internally inconsistent since it contains not only the motion for injunction, but also a motion for rehearing. Appellant could not take an appeal and at the same time obtain a rehearing by the district court since an effective notice of appeal would divest the district court of jurisdiction and prevent it from acting upon the Rule 60(b) motion. *Long v. Bureau of Economic Analysis*, 646 F.2d 1310, 1318 (9th Cir. 1981), *vacated on other grounds*, 102 S. Ct. 468 (1981); *Smith v. Lujan*, 588 F.2d 1304, 1307 (9th Cir. 1979); *Crateo, Inc. v. Intermark, Inc.*, 536 F.2d 862, 869 (9th Cir. 1976).

Appellant's counsel indicated in his briefs and at oral argument that he intended that the document *not* be treated as a notice of appeal precisely because it would divest the district court of jurisdiction to act on the Rule 60(b) motion.

> Appellant cannot help but comment on the agonizing procedural situation which, in the absence of some definite rule, faced it. If a formal notice of appeal had been filed, the District Court might well have refused to consider the Rule 60(b) motion, no matter what its merits, causing another disastrous delay in decision.

Appellant's Brief in Opposition to Motion to Dismiss Appeal, p. 6. To treat the motion for injunction as a notice of appeal and yet allow the district court to retain jurisdiction would allow appellant to have its proverbial cake and eat it too.

The document filed by appellant and counsel's statements regarding it evince a desire to have the district court retain jurisdiction and alter its judgment rather than a desire to effectively take an appeal and thus terminate the district court's jurisdiction. This distinguishes *Cutting* where the notice contained no inherent ambiguity and indeed expressly stated appellants' "desire to post a supersedeas bond and perfect an appeal." 178 F.2d at 775-76.

Appellant argues that an earlier order of this court remanding the case to the district court for further proceedings was only a "limited remand," and that this court retained jurisdiction. Although the court had power to retain jurisdiction and order a limited remand, *see Sekaquaptewa v. MacDonald*, 544 F.2d 396, 400-01 (9th Cir. 1976); 16 C. Wright & A. Miller, *Federal Practice and Procedure* § 3937 (1977), this court's order indicated no intention to do so. *Cf. United States v. Theriault*, 526 F.2d 698, 699 (5th Cir. 1976).

For these reasons we decline to treat the petition as a notice of appeal, and conclude that no timely appeal was taken from the underlying judgment.

The actual notice of appeal, however, may be treated as a timely appeal from the district court's order denying appellant's Rule 60(b) motion. This is true although the notice did not identify that order as the order appealed

from, *see Foman, supra,* 371 U.S. at 180-82; *Jackman v. Military Publications,* 350 F.2d 383, 384 (3d Cir. 1965), and was prematurely filed before the district court disposed of the Rule 60(b) motion. *See Curtis Gallery, supra,* 388 F.2d at 360. *Cf.* Fed. R. App. P. 4(a)(4).

But appellant errs in arguing our review of the denial of the Rule 60(b) motion reaches the merits of the district court's grant of summary judgment. The appeal does not bring up the underlying judgment for review; we review only for abuse of discretion. *Browder, supra,* 434 U.S. at 263 n.7; *Matter of Roach,* 660 F.2d 1316, 1318 (9th Cir. 1981); *United States v. Russell,* 578 F.2d 806, 807 (9th Cir. 1978).

Appellant concedes that ordinarily only abuse of discretion can be considered, but contends we must address the merits in this case because the post-trial motion was "addressed to the question of jurisdiction." Although review of a Rule 60(b) motion may encompass a claim that the district acted in excess of its jurisdiction, *see United States v. Russell, supra,* 578 F.2d at 807, no such contention is advanced here. The "jurisdictional" question raised by appellant's complaint was whether the ALRB or National Labor Relations Board had jurisdiction over its employees. Appellant has never challenged the subject matter jurisdiction of the district court, and has never asserted the judgment was void. *Cf.* Fed R. Civ. P. 60(b)(4); 11 C. Wright & A. Miller, *Federal Practice and Procedure,* § 2862 (1973).

The district judge "did not abuse his discretion in ruling that sufficient grounds for disturbing the finality of the judgment were not shown . . ." *United States v. Russell,*

quoting Brennan v. Midwestern United Life Insurance Co., 450 F.2d 999, 1003 (7th Cir. 1971). The only new fact alleged was that on September 4, 1979 appellant had received notice from ALRB that union organizers would meet with appellant's employees in accordance with ALRB regulations. According to appellant, this constituted the beginning of "a whole series of procedural steps which must be taken before an actual election is scheduled." But under the rationale of the district court's original order of dismissal, cognizable injury was still speculative and hypothetical. As the Court said in dismissing the suit: "several hypothetical events would have to occur before such a certification [of a union as bargaining representative] might pose a realistic threat of injury—a labor organization would have to file the requisite petitions, win the election, and the ALRB would have to decide that it has jurisdiction over these employees." Indeed, in dismissing the suit the court expressly concluded it was not significant that, shortly before the court ruled, UFW had filed a preliminary election petition giving notice of intent to meet with appellant's employees in accordance with ALRB regulations. In these circumstances, the court did not abuse its discretion in impliedly finding the "new" events "fail[ed] to advance the dispute out of the realm of hypothesis and conjecture into the world of reality."

Appellees' motion to dismiss the appeal from the grant of summary judgment is granted and the appeal from the judgment is dismissed. The district court's denial of appellant's motion for rehearing is affirmed.

APPENDIX B

United States District Court
Northern District of California

No. C-76-2381 ACW

Cel-A-Pak, a California corporation,
Plaintiff,

vs.

California Agricultural Labor Relations Board, et al.,
Defendants

Order of Dismissal

[Filed Aug. 30, 1979]

In an order issued on April 28, 1977, this Court granted defendants' motions to dismiss this case. A Ninth Circuit panel, having concluded that the record before it did not "accurately represent the present posture of this dispute," remanded the case for further consideration. While expressing no opinion on the merit of this Court's position that the abstention doctrine required dismissal of the case, the panel intimated that recent events had mooted plaintiff Cel-A-Pak's claims against defendant California Agricultural Labor Relations Board (ALRB) and suggested that the disposition of a separate case involving defendant United Farm Workers (UFW) might bar further prosecution of plaintiff's damages action against that party.[1]

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[1]That Court held in pertinent part as follows:

> We conclude that the record before us does not accurately represent the present posture of this dispute. We must therefore remand to the district court for further proceedings and reconsideration in light of recent events.

Since the remand, plaintiff had filed two amended complaints, the second of which the Court rejected,[2] and the plaintiff and defendants ALRB and UFW have filed and argued cross-motions for summary judgment. Plaintiff and defendant Western Conference of Teamsters (WCT) have settled their disputes. The legal positions of the remaining parties appear unchanged from two years ago except insofar as the two defendants have vigorously advanced the arguments suggested by the appellate court. To recapitulate briefly,[3] plaintiff seeks to enjoin the ALRB from exercising jurisdiction over it and its employees, to gain declaratory relief clarifying its legal positions with respect to the defendants and finding that certain provisions of the

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> On remand the court should consider whether a case or controversy presently exists which meets the threshold requirement of Article III of the Constitution, *O'Shea v. Littleton*, 414 U.S. 488 (1974), or whether the harms complained of are based on possibilities which are speculative at best, *Roe v. Wade*, 410 U.S. 113 (1973). *Cf. Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974). The variable status of several factors leads to a strong inference that there is no case ripe for adjudication or that the issues presented may now be moot.
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> The effect of the NLRB determination regarding CAP's drivers and the disposition of *Cel-A-Pak v. United Farm Workers Organizing Committee, et al.*, C-70-1843 LHB, should also be considered in determining the propriety of entertaining CAP's action for damages against the UFW.

Cel-A-Pak v. ALRB, et al., No. 76-2381, slip op. at 5 (9th Cir. August 28, 1979) (unpublished opinion).

[2]Plaintiff propounded a second amended complaint based upon recent activity of the UFW that was supposedly under the supervisory control of the ALRB. The Court denied plaintiff leave to file this complaint because of plaintiff's failure to show that this alleged activity affected it or that the activity was related to the present cause of action.

[3]For a more detailed discussion of the facts and legal theories involved in this case, see the exposition in this Court's previous order of dismissal and the Ninth Circuit's unpublished opinion.

California Agricultural Labor Relations Act (CALRA) are unconstitutional, and to win secondary boycott damages against the UFW. At this time, the Court grants defendants' motions for summary judgment and, again, dismisses the case.

1. *Plaintiff's Claims Against the ALRB Do Not Meet Article III § 2's Case or Controversy Requirements.*

Article III, § 2 of the Constitution requires that federal courts only hear matters raising a justiciable "case or controversy." When the parties' claims raise only "abstract questions" or when events subsequent to the filing of the action moot the controversies in issue, the court must usually dismiss the case.

Determining the existence of a case or controversy involves an exercise of judicial line-drawing: "The difference between an abstract question and a 'case or controversy' is one of degree, of course, and is not discernible by any precise test." *Babbitt v. United Farm Workers National Union*, 47 U.S.L.W. 4659, 4661 (1979) (quoting *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941)). A claimant seeking to enjoin the operation of a statute must show "a realistic danger of sustaining a direct injury" as a result of the statute's operation or enforcement. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1973). The inquiry in an action for declaratory relief is very similar: the question is "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Casualty Co.*, 312 U.S. at 273. In both situations, the court must focus upon whether the threat of injury is "real and immediate" as op-

posed to "conjectural or hypothetical." *O'Shea v. Littleton*, 414 U.S. at 494. An additional consideration arises in cases involving governmental action when it is alleged that the nature of that action makes the issues presented "capable of repetition, yet evading review." *See Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122 (1973); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911).

Several events occurred subsequent to the issuance of this Court's previous order that have substantially altered the immediacy and reality of the controversy at issue. The withdrawal of the WCT from the controversy has mooted the Court's earlier finding of case or controversy. When the parties last raised this issue, it appeared reasonably certain that the ALRB would certify the WCT as the bargaining representative of plaintiff's harvesters and that, under certain provisions of the CALRA, the WCT would consider its previous agreement with plaintiff to be void. In light of the injury plaintiff would have suffered from the termination of this contract, the Court found that an actual controversy existed concerning ALRB jurisdiction to decide the certification issue. However, the ALRB never acted upon the WCT's request and, in June 1978, the WCT withdrew its certification petition. In addition, all of the unfair labor practice charges pertaining to this case that the different parties have filed with the ALRB have either been dismissed or withdrawn. Finally, in July 1978, the Independent Union of Agricultural Workers and the UFW filed with the ALRB notices of intent to take access and to organize plaintiff's employees. The ALRB conducted two elections among plaintiff's field employees in July and August of 1978. "No union" received a majority of the votes cast. The ALRB certified that result on August 31, 1978.

That certification precludes filing of further election petitions until August 31, 1979. Cal. Lab. Code § 1156.5 (West Supp. 1979). Thus, plaintiff is involved in no presently pending proceedings before the ALRB and has yet to receive any unfavorable or favorable determination from that body. In fact, several hypothetical events would have to occur before such a certification might pose a realistic threat of injury—a labor organization would have to file the requisite petitions, win the election, and the ALRB would have to decide that it has jurisdiction over those employees.[4]

The present lack of contracts between these two parties[5] and the conjectural chain of events that must occur prior to the reemergence of their conflicts indicates the absence of any realistic danger that plaintiff will suffer or has suffered direct injury as a result of the operation of the CALRA, or that the parties, at present, have adverse legal interests of sufficient immediacy and reality to justify the issuance of a declaratory judgment.[6] The fact that some

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[4]Just prior to the filing of this order, plaintiff submitted an affidavit with attached evidence indicating that the UFW had filed a preliminary election petition giving notice of intent to engage in access at plaintiff's property. While this action represents the first step in the chain of events that could possibly raise a justiciable controversy between the parties, the Court finds that it fails to advance the dispute out of the realm of hypothesis and conjecture into the world of reality.

[5]See footnote 2 *supra*.

[6]Contrary to plaintiff's assertions, the recent decision of Babbitt v. United Farm Workers National Union, 47 U.S.L.W. 4659 (June 5, 1979), lends no support to its arguments. That case also involved questions over whether a party (the UFW) challenging a state agricultural labor relations act had alleged a case or controversy. The Court found that plaintiff's allegations concerning three of the statutory provisions raised a case or controversy and that two of the

time in the future plaintiff may be subject to the liberal access and boycott rules of the CALRA raises only a speculative problem. The instances of plaintiff's involvement with the ALRB in concluded administrative proceedings and in connection with the elections that have been held have not caused it cognizable injury. *Cf. Renegotiation Board v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) (holding that mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury); *State of California ex rel. Christensen v. FTC*, 549 F.2d 1321, 1323 (9th Cir. 1977). Finally, plaintiff's arguments that this action involves case or controversy concerns similar to those raised in *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 116 (1973) must be rejected.

In *Super Tire*, plaintiff-employer challenged the legality of a state policy granting public assistance to striking workers. Despite the settlement of the labor dispute that gave rise to the lawsuit prior to the hearing of the matter in the district court, the Supreme Court, reversing the Court of Appeals, held that the facts raised a case or controversy under two different theories. First, the Court held that the challenged government activity, "by its continuing and brooding presence," affected the new collective-bargaining agreement, as well as "every existing collective-bargaining agreement," and thus had a substantial adverse effect on the parties' interests, 416 U.S. at 122-25. The Court carefully distinguished the case before it from the

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challenges failed to do so. These determinations rested upon the Court's careful consideration of whether the particular provisions caused plaintiff present injury or a sufficient threat of injury, or if the provisions raised a mere conjectural possibility of such injury. The analysis advanced herein follows this same approach. Thus, this decision is consistent with *Babbitt*.

situations in *Oil Workers Unions v. Missouri*, 361 U.S. 363 (1980) and *Harris v. Battle*, 348 U.S. 803 (1954). Those cases both involved challenges of state statutes authorizing the Governor, in his discretion, to seize a public utility in the event of a strike that interfered with the public interest. In both instances, the seizure and strike had terminated before the case reached the Court, and the Court held the cases to be moot. *Super Tire* noted that those cases raised only remote and speculative matters, "two steps removed from reality." 416 U.S. at 123. The recurrence of a seizure depended upon the happening of another strike and the Governor's exercise of his discretion. In contrast, the government action in *Super Tire* involved a *fixed and definite* policy affecting both live labor disputes and ongoing collective-bargaining relationships. 416 U.S. at 124.

The situation here more closely resembles *Harris* and *Oil Workers* than *Super Tire*. As noted above, several actions would have to occur before the ALRB could exercise jurisdiction over the plaintiff and the plaintiff could thereby suffer injury. Similarly, plaintiff cannot point to any fixed and definite policy because the issue of ALRB jurisdiction over plaintiff's employees is still undecided. In addition, there is no existing collective-bargaining agreement involving the plaintiff that such a potential policy could effect. Finally, the fact that plaintiff's field employees have previously rejected union representation suggest that any undetermined effect that the possibility of ALRB jurisdiction may have on the present employer-employee relationship is minimal. The "brooding presence" doctrine does not apply to this case. *See generally Division 580,*

Amalgamated Transit Union v. Central New York Regional Transportation Authority, 578 F.2d 29 (2d Cir. 1978).

The Court in *Super Tire* also based its decision on its finding that that case was of the type presenting an issue "capable of repetition, yet evading review." 416 U.S. at 125. This long-standing mootness exception permits federal courts to hear challenges to significant governmental action or policy, despite the fact that the claimant's dispute has mooted, if that controversy is likely to reoccur and to expire prior to judicial review. *See Nebraska Press Association v. Stuart*, 427 U.S. 539, 546-47 (1976); *Super Tire*, 416 U.S. at 125.

While the controversies alleged herein may reemerge upon the happening of the contingencies noted above, there is no showing that they would evade review. In fact, the plaintiff would have several avenues through which it could challenge the ALRB's assertion of jurisdiction over it. Plaintiff could raise these matters with the ALRB, the decision of which would be appealable in state court and ultimately in the federal courts. Plaintiff could also raise its jurisdictional claim before the National Labor Relations Board (NLRB), claiming that a petition filed with the ALRB raises a question of representation. The ALRB usually defers action in such cases. Plaintiff could challenge the NLRB determination in federal court. Finally, while this Court has previously ruled that the abstention doctrine should control such a case and again suggests that the expertise of the administrative agency should be utilized in this matter, it is possible that plaintiff could challenge the ALRB's certification decision directly in federal court. Once jurisdiction is asserted by the ALRB, the issue will not disappear and plaintiff will have various ways to challenge that decision.

For all of the reasons stated above, the Court grants defendant ALRB's motion for summary judgment.

2. The Doctrine of Res Judicata Bars Plaintiff from Relitigating its Claims Against the UFW.

In an order issued on July 1, 1977, Judge Burke of the United States District Court for the Northern District of California dismissed with prejudice for lack of prosecution the case of *Cel-A-Pak v. United Farm Workers Organizing Committee, et al.*, C-70-1843. As discussed below, the present case against the UFW and the dismissed action appear to involve the same parties and the same cause of action, at least, insofar as those terms are used for purposes of *res judicata*. Therefore, the Court concludes that the doctrine of *res judicata* requires the dismissal of plaintiff's present claim against the UFW.

The Ninth Circuit has described the doctrine of *res judicata* as follows: "A final judgment on the merits between parties who in law are the same operates as a bar to a subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action." *Abramson v. University of Hawaii*, 594 F.2d 202, 206 (9th Cir. 1979) (quoting *Flynn v. State Board of Chiropractic Examiners*, 418 F.2d 668 (9th Cir. 1969)). A dismissal with prejudice, as occurred in the earlier case here, constitutes a final judgment on the merits and bars a later suit on the same cause of action. *Lawlor v. National Screen Service*, 349 U.S. 322, 327 (1955). Plaintiff, however, contests the applicability of the doctrine of *res judicata* on the grounds that the two actions do not involve the same parties or the same causes of action.

These two cases clearly involve the same parties. In order to invoke the doctrine of *res judicata*, a party must show that the two actions both involve the "same parties or their privies," *see e.g., Mirin v. State of Nevada ex rel. Public Service Commission**, or, under a slightly different approach, that there is "substantial identity" between the parties to the two actions. *See Chicago Rock Island & Pacific Railway Co. v. Schendel*, 270 U.S. 611 (1926). Some courts, departing somewhat from the mutuality requirement, even allow the assertion of *res judicata* against a plaintiff who has brought the same claim against "different defendants where there is a close or significant relationship between successive defendants." *Gambocz v. Yelencsics*, 468 F.2d 837, 841 (3rd Cir. 1972).

Under any of these approaches, defendant United Farm Workers of America, AFL-CIO (UFW) qualifies as the "same party" as former defendant United Farm Workers Organizing Committee AFL-CIO (UFWOC). The slight difference in the captions of the two complaints is not determinative of the issue, *Moore's Federal Practice* § 0.411[3] at 1424; "identity of parties is not a mere matter of form, but [is a question] of substance." *Chicago Rock Island & Pacific Railway Co.*, 270 U.S. 620. The UFW came into being in 1973 as a successor organization to the UFWOC. While the organization's different relationship with the AFL-CIO—it changed from an organizing committee to an affiliate—may possibly have had some legal significance in other contexts, this change altered nothing insofar as this dispute between the parties is concerned. Plaintiff's numerous references to the UFW as opposed to the UFWOC in its pleading papers in the earlier case

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*547 F.2d 91, 94 (9th Cir. 1976), *cert. denied*, 432 U.S. 906 (1974).

illustrate that it considered the organizations to be one and the same. In view of the fact that plaintiff's former complaint charged defendant with a continuing course of conduct significantly overlapping the transformation of the UFWOC into the UFW, it is likely that it would have joined the UFW as a defendant in that case if it had believed that the two organizations actually differed in any legal sense. This Court finds that the two actions involved the same parties.

The two cases also involve the same "cause of action." Courts have propounded various tests to determine what constitutes a cause of action for purposes of *res judicata*. These standards include:

> whether the same right is infringed by the same wrong; whether "there is such a measure of identity that a different judgment in the second [action] could destroy or impair rights or interests established by the first" judgment; identity of grounds; whether the same evidence would suffice to sustain both judgments.

Moore's Federal Practice § 0.410 at 1158. All of these tests indicate that the central question is whether the second action raises any new and substantial questions of law or fact that were not raised, and could not have been raised, in the first case. *See generally Abramson v. University of Hawaii*, 594 F.2d at 206; *Flynn v. State Board of Chiropractic Examiners*, 418 F.2d at 668. In making this determination, the court must insure that each litigant has its day in court while also seeking to eliminate needless, repetitive litigation.

The identity of the legal issues in these two cases supports the proposition that these cases involve the same cause of action. In both cases, the legality of the defend-

ant's activity depends upon whether defendant is exempt under the agricultural employees' exemption from the rules and regulations of the National Labor Relations Act. None of the events that have occurred since plaintiff's filing of its first action have significantly affected the questions underlying that matter. Plaintiff's counsel himself has admitted the identity of these actions. The affidavit of Richard H. Foster filed on July 2, 1977, as an attachment to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss in the case before Judge Burke states the following:

> 14. On October 16, 1976 plaintiff filed an action in the United States District Court for the Northern District of California, Case No. C-76-2381 ACW . . . This case involved the identical issue before this Court with respect to the secondary boycott . . . The crucial question in that case, as in this one, however, was whether Cel-A-Pak Corporation and/or United Farm Workers were subject to the jurisdiction of the Federal Act.

This sworn statement of plaintiff's counsel clearly attests to the identity of these actions.

All of the matters presently before the Court could and should have been raised in the earlier case. Both complaints claim that defendant's allegedly illegal secondary boycott activity have caused plaintiff damages "in excess of $100,000." While the earlier complaint refers to events that occurred prior to and during 1970 and the latter complaint supposedly covers events from 1972-1976, plaintiff could have litigated those later events in its earlier cause of action. That action was not dismissed until 1977. Any time prior to the dismissal, plaintiff could have filed an amended or supplemental complaint based upon defendant's continuing conduct and other events related to the cause of action.

In fact, plaintiff anticipated taking such action in that case when it stated in the third cause of action in its complaint that: "the aforesaid defendants continue their activities, and Plaintiff asks leave to amend this complaint to increase such damages when the same are ascertained." Plaintiff's failure to act cannot excuse the fact that those matters could have been litigated in the earlier action.

Contrary to plaintiff's claims, *Lawlor v. United States*, 349 U.S. 322 (1955), does not preclude application of *res judicata* in this case. That case stands for the proposition that a course of conduct upon which a previous judgment was based will give rise to a second cause of action based upon the same type of conduct *occurring subsequent to the previous judgment*. As far as conduct occurring prior to that judgment, *Lawlor* stated: "[T]he 1943 judgment precludes recovery on claims arising *prior to its entry*." 349 U.S. at 328 (emphasis added). In this case, the conduct occurred prior to termination of the first case and thus could have been litigated therein.[1] This application of the

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[1]The case of Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 421 F.2d 1313 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971), involving many of the same parties found in *Lawlor*, appears to direct a different result. In that case, three different suits were filed based upon a continuing course of conduct alleged to violate the antitrust laws. Suit No. 1 was filed in 1961; suit No. 2 in 1964; and suit No. 3 in 1967. Suits Nos. 1 & 2 were disposed of together by a granting of summary judgment in defendant's favor. The Fifth Circuit panel held that *res judicata* barred the recovery of damages in suit No. 3 only for the time prior to *the filing* of suit No. 2.

This Court's reading of *Lawlor* finds the *entry of judgment* of the previous suit to be the cut off time for the bar of *res judicata* as opposed to the time of its filing. *Lawlor* specifically refers to the entry of judgment as the important date, 349 U.S. at 328, and most other authorities have followed that interpretation. *See* Carter-

doctrine of *res judicata* may appear rather harsh. However it must be remembered that this claimant has had its day in court. Plaintiff's failure to actively pursue that day cannot justify the continuation of this action which but for plaintiff's conduct should have been a needless and repetitive case. The Court thus dismisses plaintiff's claims against defendant UFW.

ACCORDINGLY, for the reasons stated above, IT IS HEREBY ORDERED THAT defendants' motions for summary judgment are GRANTED and plaintiff's motions for summary judgment is DENIED.

Dated: August 30, 1979

ALBERT C. WOLLENBERG
Albert C. Wollenberg
United States District Judge

Wallace, Inc. v. United States, 449 F.2d 1374, 1387-88 (CT CT-1 (1971) ; Cream Top Creamery v. Dean-Milk Co., 383 F.2d 358, 363 (6th Cir. 1967); United States v. General Electric Co., 358 F. Supp. 731, 740 (S.D.N.Y. 1973); Moore's Federal Practice ¶ 0.448 at 4231.

The application of *res judicata* depends upon the court's balancing of competing policy considerations. As the concluding textual discussion indicates, the Court feels that those factors favor the invocation of the bar of *res judicata* in this case.